IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SALES TAX REFERENCE No. 14 of 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE ANIL R. DAVE

&

HONOURABLE MS. JUSTICE R.M.DOSHIT

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to Civil judge ?

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STATE OF GUJARAT - Applicant(s)

Versus

UNITED FABRICATION - Respondent(s)

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Appearance :

MR VP PANCHOLI AGP for Applicant-State

SERVED BY RPAD - (N) for Respondents

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CORAM : HONOURABLE MR.JUSTICE ANIL R. DAVE

and

HONOURABLE MS. JUSTICE R.M.DOSHIT

Date : 06/02/2006

ORAL JUDGMENT **(Per : HON'BLE MS. JUSTICE R.M.DOSHIT)**

This Reference made by the Gujarat Sales Tax Tribunal, Ahmedabad [hereinafter referred to as, "***the Tribunal***"]under Section 69 of the Gujarat Sales Tax Act, 1969 [hereinafter referred to as, "***the Act***"] arises from

the common judgment and order dated 24th November, 1993 passed by the Tribunal in Second Appeals Nos. 305 of 1990 to 307 of 1990 preferred by M/s. United Fabricators and Second Appeal No. 227 of 1991 preferred by M/s. Unity Engineering Products. As the facts are similar and the questions are identical, the following common question is referred at the instance of the Revenue :-

> ***"Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the assessment order passed under section 31 (3) of the Gujarat Sales Tax Act, 1969 is time barred in view of the provisions of section 41 (3) read with section 42 (1) of the Act ?"***

Following common questions have been referred at the instance of the respective dealer :-

> ***"[1] Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the Paver Finisher Machine is not covered by Entry No. 16 (1) of Schedule II, Part-A of the Gujarat Sales Tax Act, 1969, as it stood before 1/4/1992 ?"***
>
> ***[2] Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the Paver Finisher Machine is not covered by Entry 36 of the Government Notification issued under section 49 (2) of the Gujarat Sales Tax Act, 1969 ?***
>
> ***[3] Whether on the facts and in the circumstances of the case, the Tribunal's finding that Paver Finisher Machine does not perform any function in the manufacture of goods is not right and/or is per verse and not tenable in law?"***

Both the above referred assessees [hereinafter cumulatively referred to as, "***the dealer***"] are carrying on the business of manufacturing Paver Finisher Machine, Hot Mix Plant, Asphalt Plant, Paving Units, etc. The dealer had submitted their returns for the years 1981-82; 1982-83; 1983-84; 1984-85; 1985-86 and had paid the taxes due as per the returns. The said returns were not accepted by the Assessing Officer. Accordingly a notice was issued in Form 36 informing the dealer that the returns submitted by the dealer were required to be verified and calling upon the dealer to remain present and to submit further evidence. According to the dealer, the paving machine and its spare parts manufactured and sold by the dealer were the machinery used for manufacturing goods. The tax on sale of the said machines was, therefore, governed by entry 16 (1) in Part-A of Schedule-II to the Act. The Assessing Officer did not accept such explanation and taxed the aforesaid machinery and the spare-parts under the residual entry. The question, therefore, arose whether the aforesaid machinery manufactured by the dealer fell within entry 16 (1) of Schedule-II, Part-A. The dealer also claimed that part of the tax payable on the turnover of the spare parts of the said machinery was exempted under entry 36

under the Government Notification issued under Section 49 (1) of the Act. Both the aforesaid contentions were negatived by the Assessing Officer. The Assessing Officer by Orders dated 1st May, 1989 and 15th May, 1989 exercised power under Section 41 (5) of the Act and held that the tax on sale of the aforesaid machinery manufactured by the dealer was governed by the residual entry and charged the tax and interest accordingly. Feeling aggrieved, the dealer preferred appeals before the appellate authority. The appellate authority, by a common judgment and order dated 16th June, 1990, dismissed the Appeals. Feeling aggrieved, the dealer preferred above referred Second Appeals before the Tribunal.

The dealer assailed the order of the appellate authority on the grounds that the assessment orders were barred by the law of limitation and were thus null and void. The dealer also claimed that the machinrey manufactured by them was used in manufacture of goods and thus was governed by entry 16 (1) in Part-A of Schedule-II to the Act. It was submitted that though the assessment orders were ostensibly made in exercise of power conferred by Section 41 (5) of the Act, the same were essentially made under Section 41 (3) of the Act.

The said orders were indisputably time-barred and were non-est. *Both the aforesaid contentions were negatived by the Assessing Officer* as well as by the Appellate Authority. The Tribunal, however, accepted the first contention raised by the dealer i.e. the Tribunal upheld the contention that the *impugned* assessment orders were essentially made under Section 41 (3) of the Act and not under Section 41 (5) of the Act as mentioned in the orders. The *impugned* assessment orders were, therefore, barred by the law of limitation and were null and void. On the second issue, the Tribunal, confirmed the order of the Appellate Authority. Therefore, the present Reference.

The Tribunal has held that the assessment orders in question were made by the Assessing Officer beyond the prescribed period and thus were time-barred. Section 40 of the Act provides for declarations and returns required to be submitted by every registered dealer. Section 41 of the Act provides for assessment of taxes. Sub-section (3) thereof empowers the Commissioner; if he is not satisfied about the correctness or completeness of the declarations and returns furnished by a dealer in respect of any period and if he thinks it necessary, to require the presence of dealer or production of further evidence by

giving a notice in the prescribed manner. The proviso, *inter alia,* provides that such notice shall be given within a period of one year from the date of last quarterly or annual return; as the case may be. *Admittedly*, in the present case notice in question was issued long after the expiry of the aforesaid period of one year i.e. the *impugned* assessment orders were indeed time-barred. The Appellate Authority, however, held that the *impugned* orders of assessment were made by the Assessing Officer under Section 41 (5) of the Act. As no period of limitation has been prescribed for exercise of power under Section 41 (5) of the Act, the *impugned* orders of assessment were legal and valid. In Second Appeal preferred before the Tribunal, the Tribunal has observed that, "***we have verified from the record of the Department and found that only one notice was served on the appellant Messrs. United Fabrications and that was under Section 41 (3) of the Act.***"

Learned AGP Mr. Pancholi has vehemently submitted that the *impugned* orders of assessment are self-explanatory. The *impugned* orders refer to the notice issued in Form No. 36. As the returns and declarations were signed by one Hirjibhai Nanjibhai, not an authorized person, the same were *non est* in the eye of

law. The Assessing Officer had, therefore, exercised powers conferred by Section 41 (5) of the Act and had made the assessment in his best judgment. We are unable to accept the submission made by Mr. Pancholi. As it is evident Form No. 36 is a composite form for notice which is required to be issued under either of the sub-sections (3), (5) or (6) of Section 41 of the Act. Once the Tribunal had verified the record and has recorded the finding that the notice issued was one under sub-section (3) of Section 41 of the Act, in absence of any evidence before us, we have no reason to take any different view. Besides, the aforesaid notice under Section 41 (3) of the Act was issued in connection with one of the assessment orders alone. In respect of the other assessment orders, the Revenue failed to prove that any notice as envisaged either by Section 41 (5) of the Act or by Section 41 (3) of the Act was ever issued. Admittedly, the assessment orders have been made well after the prescribed period of limitation and were, therefore, illegal and invalid as held by the Tribunal. We, therefore, answer the aforesaid question referred at the instance of the Revenue in affirmative, in favour of the dealer and against the Revenue.

Now that we have answered the first question in

affirmative, the rest of the three questions do not survive. Nevertheless, we do consider and answer the said questions as under :-

The entry 16 (1) of Schedule-II, Part-A applicable at the relevant time read as under :-

"16 (1)	***Machinery used in the manufacture of goods excluding machinery specified in any other entry in this or any other Schedule.***	***[six paise in the rupee]***	***[six paise in the rupee]***

The aforesaid entry 36 applicable at the relevant time read as under :-

Sr. No.	Description of Goods	Rate of Sales tax	Rate of General sales tax
36	Sales of spare parts and accessories [excluding ball bearings] of machinery which is covered by sub-entry(1) of entry 16 in Part A of Schedule-II.	To the extent to which the amount of sales tax exceeds four paise in rupee and whole of general sales tax.	NIL

The aforesaid three questions are inter-connected in as much as the exemption under the aforesaid entry 36 can be claimed only in case the machinery in question is covered by the aforesaid entry 16 (1). It is admitted

that the said machinery was used for mixing the stone and the hot asphalt and for laying such mixture on the road surface and to level it. By no stretch of imagination, the said machinery can be said to be *"used in the manufacture of goods*." We are, therefore, in agreement with the decision of the Tribunal. The above referred three questions referred at the instance of the dealer are accordingly answered in affirmative in favour of the Revenue and against the dealer.

The Reference stands disposed of in the above terms.

{A.R Dave, J.}

{Miss R.M Doshit, J.}

*Prakash**